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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 998

CLYDE B. ROGERS, BETTY J. ROGERS, JOHN L. LEMSTER, and as a class, all persons similarly situated, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF ARAPAHOE,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, a municipal corporation; and THE CHERRY CREEK SCHOOL DISTRICT NO. 5 in the County of Arapahoe and State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellees' framing of the "Question Presented" strays far from the basis of Appellants' contention, which is that the classification of "landowners" who are entitled to petition or counterpetition to force annexation elections creates an arbitrary and invidious discrimination with no rational basis in law or fact. (Jurisdictional Statement, p. 3.)

Appellants concede that the laws of the State of Colorado were followed in the annexation proceeding questioned herein and even that the State may exercise plenary power over annexations; but Appellants concede the latter point only if the exercise of that power by the State remains within constitutional bounds. Appellants steadfastly deny the right of the State to exercise any power in a manner which deprives citizens of constitutionally protected rights be they State or Federal.

Appellants deny any allegations of unconstitutionality made in a "vacuum and without specificity." On the contrary a specific set of facts and specific claims of deprivation of rights and invidious discrimination have been made. (Jurisdictional Statement pp. 3-6.)

In *Kelly v. Pittsburgh,* 104 U.S. 78, cited by Appellees, Kelly raised no objection to annexation, but only to the imposition of taxes on his farm property, which taxes were to be used for general city purposes. This Court in that case pointed out the advantages to Kelly's property and held that the tax was for a public purpose and therefore valid. It was also held that the tax, if excessive, could not be modified by the Court.

In the instant case excessive or unconstitutional use of taxes is *not* at issue. The issue here is the constitutionality of the definition of "Landowners" in Colorado Revised Statutes, 1963, Chapter 139-10-8, and whether such definition creates an unconstitutionally arbitrary classification and invidious discrimination violative of Appellants' rights to due process and equal protection of the law.

Appellees' cite *Mayor v. Shattuck,* 19 Colo. 104, 34 Pac. 947, 950 (1893) somewhat out of context. The Colorado Supreme Court, at the point cited, merely stated that: "We find nowhere in the constitution any provision forbidding the submission of the question of dissolution or annexation to the determination of taxpaying electors." 19 Colo. at 112, 34 Pac. at 950. This is not inconsistent with Appellants'

claim that if the annexation is, by legislative enactment, to be submitted to the taxpaying electors, the classification of "taxpaying electors" may not be arbitrary and discriminatory. Whether this Court is bound by the decision of the Colorado Supreme Court that the Legislature may choose any *appropriate* agency (in the context of manner or means of accomplishment) to "change, modify or disincorporate," is academic since Appellants admit the right of the Legislature to do so. It is the *appropriateness* of the manner which is herein challenged as depriving Appellants of equal protection and due process of law.

It may well be that a classification is not arbitrary or violative of constitutional safeguards if a state of facts to sustain it can be reasonably conceived, however, neither Appellees nor the Courts below have brought forth any such conception with which to fortify their position. There is no state of facts which can rationalize the invidious discrimination which arises from allowing the man who bought his house December 31 of the year prior to the raising of a petition for annexation to vote and disenfranchising the man who completed his purchase the following day, or, in the instant case, as much as 364 days later.

The *Mellon* case (*Massachusetts v. Mellon*, 262 U.S. 447 [1922]), cited by Appellees, applies only to taxpayers attempting to attack a Federal appropriation on the grounds it would increase the taxpayers taxes. The Supreme Court in that case, in fact, pointed out that the interest of a taxpayer of a municipality is direct and immediate. 262 U.S. at 486. Further, Appellants herein do not base their standing on the fact that they are taxpayers in the area annexed, but that they are "aggrieved" persons under the Colorado Statutes (C.R.S. 1963, § 139-10-6), with respect to their constitutional rights [a fact to which Appellees stipulated in paragraph 1 of the written stipulation presented to the trial court and which is part of the Record].

The *Fairview Public Utility District v. City of Anchorage* case, (368 P.2d 540, Alaska [1962]), is inappropriately

cited by the Appellees since the Colorado Legislature has already decided the issue of whether a vote will be allowed. The question is not whether property owners have the right to vote, but whether property owners, *once the right to vote is granted*, may be divided into classes resulting in an invidious discrimination as to a substantial portion of them. The Alaska annexation procedure as set forth in its Constitution and Statutes is wholly different from that of the State of Colorado and no comparison of the case law of the two States can validly be made in this case.

The County of Arapahoe may sue as a "person aggrieved" in annexation under the laws of the State of Colorado. See C.R.S. 1963, § 139-10-6, and *City and County of Denver v. Miller*, (151 Colo. 444, 379 P.2d 169, 174 [1963]) and may therefore maintain an appeal from an adverse decision of the courts below.

WHEREFORE, Appellants show this Honorable Court that they are not barred from asserting the issues raised on appeal and more fully set forth in the Jurisdictional Statement, which issues are valid, are substantial, and should be reviewed by this Honorable Court, especially in the light of changes in urban and suburban concepts since 1907 and the lack of clear guidelines in the subject matter of this case since the now seemingly outdated *Hunter* decision.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, HARRY L. ARKIN, of Denver, Colorado, being a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief In Opposition To Motion To Dismiss upon The City

and County of Denver, being the only adverse party involved herein, by depositing a true and correct copy thereof in a United States post office mail box with first class postage prepaid, addressed to its counsel of record, Max P. Zall, City Attorney, and Thomas G. Roche, Assistant City Attorney, City and County of Denver, 353 City and County Building, Denver, Colorado 80202, and by depositing two true and correct copies of said Brief in a United States post office mail box with first class postage prepaid, addressed to its counsel of record, Charles S. Rhyne, Brice W. Rhyne, Alfred J. Tighe, Jr., Rhyne & Rhyne, 400 Hill Building, Washington, D.C. 20006, on this 7th day of March, 1967.

HARRY L. ARKIN